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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

In re:	§	Chapter 11
	§	
ROCKIES REGION 2006 LIMITED PARTNERSHIP and ROCKIES REGION 2007 LIMITED PARTNERSHIP[1]	§	Case No. 18-33513-sgj-11
	§	
	§	
	§	
Debtors.	§	Jointly Administered
	§	

PRE-HEARING BRIEF IN SUPPORT OF PDC'S (I) OBJECTION TO MOTION FOR DISMISSAL OF CHAPTER 11 CASE AND (II) RESPONSE TO OBJECTION TO DEBTORS' APPLICATION FOR ORDER (A) AUTHORIZING THE RETENTION OF HARNEY MANAGEMENT PARTNERS TO PROVIDE RESPONSIBLE PARTY AND ADDITIONAL PERSONNEL (B) DESIGNATING KAREN NICOLAOU AS RESPONSIBLE PARTY EFFECTIVE AS OF THE PETITION DATE
[Relates to Motions at Docket Nos. 12, 85, & 140 and Responses at Docket Nos. 143 & 144]

PDC Energy, Inc. ("PDC"), a creditor and party in interest in the above captioned cases (the "Cases") and Managing General Partner of the Debtors, files this pre-hearing brief (the "Brief") in support of its *Objection to Motion for Dismissal of Chapter 11 Case* [Docket No. 143] ("Dismissal Objection") and its *Response to Objection to the Debtors' Application for*

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number are: Rockies Region 2006 Limited Partnership (9573) ("RR2006") and Rockies Region 2007 Limited Partnership (8835) ("RR2007").

Order (i) Authorizing the Retention of Harney Management Partners to Provide the Debtors a Responsible Party and Certain Additional Personnel, (ii) Designating Karen Nicolaou as Responsible Party for the Debtors Effective as of the Petition Date, and (iii) Granting Related Relief [Docket No. 144] ("Retention Response")[2], and respectfully represents as follows:

PRELIMINARY STATEMENT

1. These Cases, like many other chapter 11 bankruptcies filed before the Court, began with the retention of an advisor to assist with assessing the business and strategic needs of the Debtors. Often times, after assessing the issues facing the company, the advisor then negotiates the terms of a proposed transaction to address those issues and files bankruptcy with a negotiated transaction in hand that provides a clear and defined exit for the benefit of all stakeholders. This process is common in bankruptcy.

2. These Cases are no different. The Debtors retained Karen Nicolaou as the Responsible Party. Ms. Nicolaou was tasked with considering a variety of circumstances facing the Debtors, including, but not limited to, liquidity constraints, an inability to satisfy ongoing operational expenses, looming environmental obligations, and ongoing litigation. Ms. Nicolaou, as was the case with fourteen other partnerships that have confirmed chapter 11 plans in this Court, ultimately determined that commencement of these Cases was the best path to maximize value for the stakeholders. Ms. Nicolaou negotiated an agreement with PDC that (i) addresses the various issues facing the Debtors, (ii) provides a substantial return to the Debtors' limited partners, and (iii) establishes an efficient process pursuant to which other parties-in-interest can

[2] Capitalized terms used herein and not otherwise defined have the meaning set forth in the Retention Response and Dismissal Objection.

raise concerns with the proposed transaction. This is no different than any number of other chapter 11 cases.[3]

3. In the Motion to Dismiss and Retention Objection, Plaintiffs[4] take umbrage with these routine bankruptcy concepts. Removing the extraneous noise from the Motion to Dismiss and Retention Objection, their arguments focus on two issues: (i) whether requisite authority existed to retain the Responsible Party and for her to file these Cases; and (ii) whether these Cases were filed in bad faith. The first issue regarding authority is a legal issue that the Court can decide by analyzing the Debtors' Partnership Agreements and applicable law. As set forth herein and in the Retention Response and Dismissal Objection, PDC had the authority to retain the Responsible Party and the Responsible Party had the requisite authority to file bankruptcy.

4. The second issue, the alleged bad faith filing, lacks merit and is not supported by the evidence. Plaintiffs bear the burden of proof and, as the evidence will show at the Hearing, Plaintiffs cannot meet their burden. Most of the evidence Plaintiffs hope to present relates to Plaintiffs' claims and allegations asserted in the Colorado Litigation. However, as has been made clear through the parties' various discovery disputes, the alleged claims against PDC in the Colorado Litigation are not relevant to the Court's determination of the Motion to Dismiss.[5]

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[3] *See* May 29, 2019 Hr'g Tr. 15:22–16:4 ("THE COURT: . . . . What makes this situation different from pretty much every other Chapter 11 case we have? What makes this different? Because we know that many Chapter 11s are filed in response to burdensome litigation, right? Happens every day, right? . . . We know that there is technically no requirement of insolvency to file Chapter 11. We know that people file Chapter 11s with pre-negotiated term sheets. Restructuring support agreements has even become a buzz term in recent years. What makes this case different?").

[4] The Plaintiffs are: Robert R. Dufresne, as Trustee of the Dufresne Family Trust; Michael A. Gaffey, as Trustee of the Michael A. Gaffey and JoAnne M. Gaffey Living Trust dated March 2000; Ronald Glickman, as Trustee of the Glickman Family Trust established August 29, 1994; Jeffrey R. Schulein, as Trustee of the Schulein Family Trust established March 29, 1989; and William J. McDonald, as Trustee of the William J. McDonald and Judith A. McDonald Living Trust dated April 16, 1991.

[5] *See* May 17, 2019 Hr'g Tr. 29:1–5 (In excluding Mr. Moritz's testimony and report, the Court concluded "I don't think whether the litigation has value of one dollar versus a million dollars versus a hundred million dollars or more, I don't think that is going to be absolutely helpful to the Court in deciding if the bad faith/improper purpose is demonstrated here or not."); *see also* May 29, 2019 Hr'g Tr. 79:13–80:3 (In denying the motion to compel

5. For the reasons discussed herein and its Retention Response and Dismissal Objection, PDC respectfully requests that the Court deny Plaintiffs' Motion to Dismiss and grant the Debtors' Application.

BACKGROUND

6. On October 30, 2018 (the "Petition Date"), the Debtors each filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the Northern District of Texas, Dallas Division (the "Court"). The Debtors' chapter 11 cases are being jointly administered under Case No. 18-33513-SGJ-11.[6]

7. On October 30, 2018, the Debtors filed the *Application for Order (i) Authorizing the Retention of Harney Management Partners to Provide the Debtors a Responsible Party and Certain Additional Personnel, (ii) Designating Karen Nicolaou as Responsible Party for the Debtors Effective as of the Petition Date, and (iii) Granting Related Relief* [Docket No. 12] (the "Application").

8. On November 23, 2018, Plaintiffs filed their Objection to the Application [Docket No. 61] (the "Retention Objection"). On December 3, 2018, Plaintiffs filed their *Motion for Dismissal of Chapter 11 Case* [Docket No. 85] and on March 22, 2019, Plaintiffs filed their *Amended Motion for Dismissal of Chapter 11 Case* [Docket No. 140] (the "Motion to Dismiss").

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further testimony from Mr. Stump, the Court concluded "we are at a juncture where this is about discovery for the employment engagement of Ms. Nicolaou, as well as the motion to dismiss . . . But I don't think PDC's answers on these topics are particularly germane to a motion to dismiss or a retention application as to Ms. Nicolaou. It appears to me these subject areas might be very, very germane to the Colorado action . . . But as far as what we have teed up on June 20th and 21st, I think I should construe this to be beyond the scope of the issues that we're going to hear about on those dates.").

[6] A detailed recitation of the cases' procedural and factual background is included in the Retention Response and Dismissal Objection and is incorporated herein by reference.

9. On April 5, 2019, PDC filed its Retention Response and Dismissal Objection. PDC incorporates by reference those briefs as if fully set forth herein. This Brief will not recite the same legal arguments and facts set forth in the Dismissal Objection and Retention Response, but will instead supplement those filings.

ARGUMENT AND AUTHORITIES

10. The Motion to Dismiss and Retention Objection contain a number of allegations against PDC and the Responsible Party—none of which have merit. As a matter of law, the Partnership Agreements authorized the retention of the Responsible Party and provided the Responsible Party with the authority to file these Cases. Further, the evidence will show that these Cases were not filed in bad faith.

A. PDC had Proper Authority to Retain the Responsible Party and the Responsible Party had Proper Authority to File these Cases.

11. As the movants seeking dismissal, Plaintiffs bear the burden of proving by a preponderance of the evidence that the Debtors lacked authority to file these Cases. *See In re Quad-C Funding LLC*, 496 B.R. 135, 141–42 (Bankr. S.D.N.Y. 2013) ("Because the Court does not take the issue of dismissal lightly, the Court will place the burden of proof entirely on the Movants to demonstrate by a preponderance of the evidence that the Debtors' bankruptcy cases were unauthorized") (quoting *In re ComScape Telecomms., Inc.*, 423 B.R. 816, 830 (Bankr. S.D. Ohio 2010)). Plaintiffs cannot meet the burden of proof required for dismissal of these Cases.

12. The Partnership Agreements authorize PDC to manage and control the affairs of the partnerships, do what it deems necessary for the partnerships, execute any documents necessary in furtherance of the purposes of the partnerships, and hire services of any kind.[7] This

[7] *See* Partnership Agreements, § 6.01 (granting PDC "sole and exclusive right and power to manage and control the affairs of and to operate the Partnership and to do all things necessary to carry on the business of the Partnership for the purposes described in section 1.03"); *see id.*, § 1.03 (defining one of the "purposes" as the "disposition . . .

broad grant of authority is consistent with the structure of a limited partnership, which insulates the limited partners from liability by vesting decision making authority in the general partner.[8]

13. The West Virginia Limited Partnership Act, which governs partnership affairs to the extent not otherwise agreed to by partners in a partnership,[9] is silent as to the requirements for filing of a bankruptcy. *See* W. Va. Code §§ 47-9-1 - 47-9-63. Because both the Partnership Agreements and the West Virginia Limited Partnership Act are silent on the specific issue of a bankruptcy filing, the decision to commence chapter 11 cases rests with PDC as general partner or the Responsible Party pursuant to Sections 6.02 and 1.03 of the Partnership Agreements. With no express restrictions to the contrary, this broad authority is more than sufficient for PDC to retain the Responsible Party and delegate the authority to utilize the bankruptcy process to dispose of the partnerships' assets (including their interests in oil and gas wells operated by PDC), resolve all of partnerships' liabilities including the P&A Liability, and resolve alleged claims of the Debtors.[10]

i. The Provisions of the Partnership Agreements requiring a Partnership Vote Do Not Restrict the Responsible Party's Ability to file Bankruptcy.

14. Section 6.03 of the Partnership Agreements does not apply here. That provision specifically lists the restrictions on the managing general partner's (or the Responsible Party's)

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of oil and gas properties of any character"). The Partnership Agreements provide PDC with broad authority to "enter into any contract or agreement . . . in pursuance of the purposes of the Partnership". *Id.*, § 6.02; *see id.*, § 6.02(c) ("employ and retain such personnel it deems desirable for the conduct of the Partnership activities including . . . consultants."); *id.*, § 6.02(j) ("enter into agreements to hire services of any kind or nature").

[8] Plaintiffs raised for the first time during the negotiations of the Joint Pretrial Order this week a brand new argument that Delaware law required a corporate resolution by the board of directors of PDC to retain the Responsible Party. This eleventh hour argument is wholly improper and should be disregarded by the Court; nevertheless, the Partnership Agreements and West Virginia law are the applicable authority for the Court's determination on these legal issues.

[9] *See Valentine v. Sugar Rock, Inc.*, 766 S.E.2d 785, 799 (W. Va. 2014).

[10] PDC's authority that it delegated to the Responsible Party also included the authority to "perform and any all such acts it deems necessary or appropriate for the protection and preservation of the Partnership assets" and to "sell . . . assets on behalf of the Partnerships". Partnership Agreements, § 6.02(g), (i).

authority by setting forth limited circumstances in which a partnership vote is required. None of those limited circumstances are present in these Cases.

15. Plaintiffs' reliance on this provision as somehow restricting a bankruptcy filing is misplaced. First, Plaintiffs assert that the bankruptcy filing required a vote of the partnership because Section 6.03(b) requires a vote of the partnership before substantially all assets may be sold, and the purpose of the bankruptcy is to sell substantially all of the Debtors' assets.[11] This argument ignores the plain language of the Partnership Agreements. Section 6.03(b)(1) expressly grants the managing general partner (or the Responsible Party) the authority to "sell all or substantially all of the assets of the Partnership" when "cash funds of the Partnership are insufficient to pay the obligations and other liabilities of the Partnership."[12] The Debtors are unable to satisfy their ongoing obligations and, as such, the Debtors do not need the majority consent of the limited partners to sell substantially all of the assets in bankruptcy.

16. Plaintiffs next assert that Section 6.03(b)(3) restricts the authority to file bankruptcy, which provides that the managing general partner may not "do any other act which would make it impossible to carry on the ordinary business of the Partnership" without consent of the limited partners.[13] This ignores the unambiguous language of the Partnership Agreements—the "disposition of oil and gas properties of any character" is explicitly included in the "business purpose" of the partnerships.[14]

17. Plaintiffs' interpretation of the Partnership Agreements attempts to create a right of consent to the filing of a chapter 11 petition when one does not exist. Bankruptcy is a well-

[11] *See* Motion to Dismiss, ¶¶ 30–33.

[12] Partnership Agreements, § 6.03(b)(1).

[13] *See* Partnership Agreements, § 6.03(b)(3).

[14] *See* Partnership Agreements, § 1.03.

known and accepted forum for selling substantially all assets, especially for entities facing liquidity constraints that cannot meet their obligations. Accordingly, with respect to these Debtors, filing bankruptcy to pursue an asset sale does not prevent the Debtors from carrying on their ordinary business, as that business includes the disposition of oil and gas properties.

18. Second, accepting Plaintiffs' argument would render other provisions of the Partnership Agreements meaningless.[15] The phrase in Section 6.03(b)(3)—"do any other act which would make it impossible to carry on the ordinary business of the Partnership"—is limited by the preceding provisions in Section 6.03(b)(2) relating to "selling substantially all assets" which allows the managing general partner to sell substantially all assets of the partnership without a vote when the partnership cannot satisfy its obligations. Moreover, Plaintiffs, along with the other limited partners, will have an opportunity to vote on the proposed Plan of Reorganization. Plaintiffs' argument that Section 6.03(b)(3) somehow limits the managing general partner's ability to sell substantially all of the assets of the partnerships is nonsensical. That interpretation is clearly incorrect because Section 6.03(b)(2) provides that exact authority.

19. For all the reasons that PDC has authority to commence these Cases, PDC has the discretion and authority to retain and designate the Responsible Party pursuant to the Partnership Agreements and applicable law.[16] Based on the Partnership Agreements and prior precedent from the Bankruptcy Court appointing a Responsible Party under similar partnership

[15] *In re Isbell Records, Inc.*, 586 F.3d 334, 337 (5th Cir. 2009) ("A contract should be interpreted as to give meaning to all of its terms—presuming that every provision was intended to accomplish some purpose, and that none are deemed superfluous.") (citations omitted); *Admiral Ins. Co. v. Briggs*, 264 F. Supp. 2d 460, 463 n.4 (N.D. Tex. 2003) ("[I]f words of a specific meaning are followed by general words, the general words are interpreted to mean only the class or category framed by the specific words.") (quoting *Hussong v. Schwan's Sales Enters., Inc.,* 896 S.W.2d 320, 325 (Tex. App.—Houston [1st Dist.] 1995, no writ)); *see also Bischoff v. Franesa*, 56 S.E.2d 865, 898 (W. Va. 1949) (noting this rule of contract interpretation).

[16] *See* Partnership Agreements, §§ 1.03, 6.01, 6.02.

agreements,[17] PDC has the requisite authority to authorize the retention and designation of the Responsible Party. PDC's fiduciary duties existing under applicable state law remain in effect and are not eliminated or altered by appointing a Responsible Party. Moreover, as set forth in the Retention Response, Plaintiffs' additional arguments with respect to the retention terms lack merit. PDC negotiated the Engagement Letter with the Responsible Party at arm's length and, as the evidence at the Hearing will show, its provisions are market-based and consistent with the Bankruptcy Code.

ii. Article IX of the Partnership Agreements does Not Address or Relate to filing Bankruptcy.

20. Plaintiffs next contend that the bankruptcy filing is somehow prohibited or restricted under Article IX of the Partnership Agreements. Plaintiffs' argument misinterprets the Partnership Agreements and conflates bankruptcy with dissolution and winding-up under West Virginia state law.

21. Filing a chapter 11 bankruptcy petition is not the same as dissolution under state law. *See In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 126 (3d Cir. 2004) ("Dissolution . . . is not an objective that can be attained in bankruptcy."); *see also In re Quad City Minority Broadcasters, Inc.*, 252 B.R. 773, 774 (Bankr. S.D. Iowa 2000) (noting the distinction between dissolution and bankruptcy). To the contrary, chapter 11 of the Bankruptcy Code clearly provides for the continued operation of a debtor-in-possession. *See* 11 U.S.C. §§ 1107, 1108. In these Cases, Debtors are utilizing the bankruptcy process properly as a vehicle to sell substantially all assets, provide for resolution of environmental liability, and maximize return for

[17] *See* prior cases in this Court before Judge Hale (in *In re Eastern 1996D Limited Partnership, et al.*, Case No. 13-34773) and Judge Houser (in *In re Colorado 2002B Limited Partnership, et al.*, Case No. 16-33743).

stakeholders. The Debtors are not in a dissolution proceeding to wind-up the business under state law.

22. Plaintiffs further assert that Section 9.03(b) of the Partnership Agreements, which allows limited partners to elect to take assets in kind in a dissolution, somehow restricts the Debtors' ability to file bankruptcy. Section 9.03(b) does not come into play until the condition precedent in Section 9.03(a) occurs: "[u]pon dissolution of the Partnership and winding up of its affairs." That condition precedent has not occurred here; therefore, this argument fails.

23. Additionally, as discussed above, PDC or the Responsible Party may sell substantially all the assets without a partnership vote. Doing so does not require pursuing a formal dissolution under Article IX. Dissolution may ultimately follow the Cases, but the Debtors are not yet dissolving.

24. More fundamentally, the provisions of Article IX and any right to a distribution in kind would be an objection to the sale of the assets under the Debtors' Plan of Reorganization; not a restriction on a bankruptcy filing in the first instance. Plaintiffs (and any other limited partners) will have the ability to assert any alleged rights to a distribution in kind when approval of the proposed sale is before the Court.[18] Asserting that the right to distribution in kind restricts a bankruptcy filing puts the cart before the horse.

B. <u>These Cases Were Not Filed in Bad Faith.</u>

25. As an initial matter, a "bankruptcy petition should be dismissed for lack of good faith only sparingly and with great caution." *See In re Gen. Growth Props.*, 409 B.R. 43, 56 (Bankr. S.D.N.Y. 2009). As the movants seeking dismissal, Plaintiffs bear the initial burden of presenting a *prima facie* case alleging bad faith, and only if they meet that burden does the

[18] PDC reserves all rights to contest any such arguments.

burden shift to the Debtors. *See In re Mirant Corp.*, No. 03-46590, 2005 WL 2148362, at *7 n.20 (Bankr. N.D. Tex. Jan. 26, 2005); *see also In re Sherwood Enters.*, 112 B.R. 165, 170–71 (Bankr. S.D. Tex. 1989) (citations omitted); *In re SGL Carbon Corp.*, 200 F.3d 154, 162 n.10 (3d Cir. 1999). Here, Plaintiffs are unable to meet their burden of establishing a *prima facie* case in support of dismissing these Cases.

26. PDC's arguments concerning the multitude of flawed allegations Plaintiffs raise in support of bad faith are set forth in the Dismissal Objection. Most of Plaintiffs' allegations speak to the alleged claims against PDC asserted by Plaintiffs in the Colorado Litigation. This Court has already determined Plaintiffs' allegations related to the merits of the Colorado Litigation are not relevant to the issues before the Court at this time. These Cases are no different than any number of chapter 11 proceedings filed before this Court, following a well-established path. *See* May 29, 2019 Hr'g Tr. 15:22–16:4.

27. Plaintiffs' newest theory to support their bad faith filing argument (as revealed in recent discovery) is that PDC directed the filing of these Cases to avoid the plugging and abandonment liability associated with the wells in which the Debtors own an interest. Simply put, Plaintiffs' theory is that PDC, as the managing general partner, is liable for the P&A Liability. Plaintiffs point to Section 7.12 of the Partnership Agreements to support this position which provides in pertinent part that "each General Partner shall be jointly and severally liable for the debts and obligations of the Partnership." This plain language regarding joint and several liability is not uncommon in limited partnerships and does not mean that these Cases were filed in bad faith. Indeed, PDC has expressly agreed to assume this P&A Liability as part of its proposed transaction with the Debtors. To assert that the Cases were filed as a bad faith attempt to avoid P&A Liability when PDC is expressly assuming such liability is nonsense.

28. Further, while PDC may be jointly and severally liable for the obligations of the Debtors, the Debtors are still liable in the first instance. The provision in the Partnership Agreements of joint and several liability is not evidence or bad faith, it merely states the law that general partners are obligated for the debts of the limited partnership. Moreover, PDC would still have a corresponding contribution claim against the Debtors for any amounts paid by PDC on the Debtors' behalf to satisfy their obligations.[19] Joint and several liability does not mean that the Debtors can simply rely on PDC to satisfy the Debtors' own debts and obligations without recourse to the Debtors.[20] In other words, the Debtors would still owe the obligation, with the only difference being to whom the obligation is owed if PDC is required to satisfy the obligation.[21]

CONCLUSION

29. Simply stated, the Debtors filed these Cases with proper authority and in good faith to (i) dispose of the partnerships' assets, (ii) address the outstanding operational liabilities of the Debtors, (iii) address the pending P&A Liability, and (iv) resolve alleged claims against PDC, including those asserted in the Colorado Litigation, in an orderly fashion to maximize the value for parties-in-interest. Bankruptcy provides the proper forum for the Debtors to address all these issues, while providing all parties, including the limited partners, an opportunity to participate in the process and vote on any proposed Plan of Reorganization. Moreover, proper

[19] *See generally Atalla v. Abdul-Baki*, 976 F.2d 189, 193 (4th Cir. 1992) (interpreting a settlement agreement to mean that an acknowledgement by the parties of their joint and several liability to a third party expressed a recognition of the fact that a contribution claim by either party, was preserved).

[20] *See Wheeling Pittsburgh Corp. Am. Ins. Co.*, No. CIV.A. 93-C-340, 2003 WL 23652106, at *21 (W. Va. Cir. Ct. Oct. 18, 2003).

[21] *See id.* (citing *Sydenstricker v. Unipunch Products, Inc.*, 288 S.E.2d 511 (1982); *Barth v. Keffer*, 464 S.E.2d 570 (1995)).

authority existed to retain the Responsible Party to advise the Debtors on the above issues and provide services in these Cases.

30. Plaintiffs' motivation in filing the Motion to Dismiss has been to conduct a premature mini-trial on the alleged claims against PDC that are stayed in the Colorado Litigation. As this Court has recognized, the merits of the alleged claims against PDC are outside the scope of the issues before the Court on the Motion to Dismiss and Retention Application. Plaintiffs will have the opportunity to address those issues at the appropriate time, but the existence of alleged claims against PDC, which PDC disputes, are not evidence of bad faith.

31. For all the reasons set forth above and in the Dismissal Objection and Retention Response, and as will be proven at the Hearing on these matters, PDC respectfully requests that this Court grant the Application and deny the Motion to Dismiss.

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WHEREFORE, PDC respectfully requests that this Court enter an order denying the relief requested in the Motion and granting such other and further relief as is just and proper.

Dated: June 13, 2019

Respectfully submitted,

/s/ Joseph P. Rovira

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the forgoing document was served this 13th day of June, 2019 via the Bankruptcy Court's Electronic Case Filing notification system on those parties registered to receive such notices, by first class United States mail, postage prepaid, on the attached Limited Service List, and *via* email on the parties listed below.

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